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ALEXANDER L. STEVAS,
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NO.83448

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ANN MACDONALD and CARL JASON

Petitioners

vs.

FERGUSON REORGANIZED SCHOOL DISTRICT R2, DR. RAY HOWELL, JOSEPH WELLS, DALLAS IMBEAUX, CAROL BARNES, JAMES POOR and EDWARD W. WILHELMS (constituent members of the Board of Education Respondent school district),

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Petitioners' Petition is Procedurally Sound

Respondents argue that the questions presented are procedurally deficient in that they were never pleaded, argued, nor briefed either in the District Court or in the Court of Appeals. Respondent's assertion is incorrect.

Petitioners have always argued it was error to take into account the size and sophistication of the schools. This was encompassed in the argument that the Court failed to compare and analyze the responsibility and skill level attendant to each position. The reason the Court failed to properly analyze and compare the responsibility and skill level was because of its emphasis and focus on size and sophistication, and the resulting conclusion that Petitioner received no demotion.

The following quotes from the brief filed in the Eighth Circuit is illustrative

of the attention given to the issues of size and sophistication:

(Appellants' Brief, pages 11 thru 15)

"That the trial court placed such a premium on the comparative quality of the schools, bespeaks it failure to focus on the sole subject of inquiry here - the amount of responsibility attendant to each position. **United States v. Gadsen County School Board**, 539 F.2d 1369 (5th Cir. 1976), 2 F.E.P. Cases 1216, presented a factual situation similar to the case at bar: a principal of a small black high school was reassigned to an assistant principalship at a larger school. The court made it very clear that

> ...the mere fact of transfer from principalship of a school of 168 students to the nominal post of assistant principal of a school of 593 students does not, in itself, establish that no demotion occurred. (Cites ommitted). Although the size of a school may have some bearing on the extent to which responsibilities are delegated among its various administrators, the focus in a case like this must remain on the responsibilities ac-

tually borne by the particular person in the particular position...at (1220)

What is needed, then, is a head to head comparison of the responsibilities of each position. The chart that follows is offered to serve that purpose:

Carl Jason

Kinloch	McCluer N.
Duties:	Duties:
1. Planning/scheduling for 262 students	1. Counsel 20 students
2. Supervision and evaluation of staff and 22 teachers	2. Supervise 11th grade
3. Plan and coordinate extracurricular activities	3. Supervise 1/5 staff (24 teachers)
4. Coordinate public relations	4. Plan Commencement**
*	*
*	5. Watch lunchroom Area**
	6. Take care of lockers**

*	7. Assign locker room stickers**

(*) No commensurate responsibilities

(**) testimony of Bill R. Hampton, McCluer principal, indicates "...these tasks can be delegated easily to a secretary.." (T., p. 236)

Ann MacDonald

Kennedy Duties:	Berkeley Duties:
1. Budgeting	*
2. Curriculm innovation and development	1. Make recommendations to principal about curriculum
3. Personnel supervision and evaluation (10) teachers	2. Evaluate approximately 35 teachers
4. Student health services	*
5. Cafeteria schedule	*
6. Building maintenance and supervision	*
7. Discipline 170 students	3. Discipline 500 students
8. Transportation	*
9. Workshops	*

10. Hiring/dismissal of staff and teachers	4. Supervise field trips	
11. Scheduling of athletic activities		*
12. Organization of officials, assignments of coaches		*

(*) No commensurate responsibility

Generally, the comparison chart reveals a change from administrative duties to counseling/clerical functions. Though Berkeley and McCluer have a larger number of students, the amount of responsibility involved increases only in those functions involving student contact, i.e. discipline of five hundred students instead of 170.

Similarly, such factors as a diverse curriculum, level of "sophistication", the rating of the school upon which the trial court relied in making its decision that Appellants were not demoted, have little or no bearing on the amount of responsibility borne.

The diversity of the curricula offered at Berkeley and McCluer would, at first glance, seem to require a higher degree of responsi-

bility of an administrator. However, Carl Jason had no duties in that area, and Ann McDonald's sole function in that regard was in making recommendations to the principal about the curriculum; the principal himself was responsible for any implementation or carrying forward with these recommendations.

It is quite difficult to imagine how the level of sophistication would affect the amount of responsibility with regard to the types of duties Appellants were assigned at Berkeley and McCluer. How much does "sophistication" change commencement exercises or field trips? How much more sophistication is required to evaluate the bi-racial faculty at Berkeley and McCluer than is necessary of evaluation of an all-black faculty?

Along the same line, one is compelled to question how the AAA rating of Berkeley and McCluer demands more responsibility of its assistant principals than the AA rating at Kinloch Schools. No evidence was introduced

from which it could be inferred Kennedy and Kinloch received the lower rating because of a lesser amount of responsibility assumed by their principals. In fact, the evidence concentrated on the poor facilities of these schools -- the limitations of the buildings, lack of adequate libraries, etc. If anything, these difficult conditions created more responsibility to be thrust on Appellants as administrators trying to make the most of their limited resources.

The School Administrators Handbook, 1969 at page 113 indicates that 'public school systems are classified "A", "AA", or "AAA" depending upon the quality, and quantity of their educational programs. Such items as teacher qualifications, instructional equipment, textbooks and supplies bear a direct relationship to the quality of instruction. The number of courses offered, services rendered, and the activities and opportunities

available reflect the quantity of the program.'

Mr. Warren Brown testified that both candidates were qualified and their presence in reorganized School District R-2 did not weaken the staff. He further testified that the librarian and others from the Kinloch School district did not weaken the staff, Tr. 473. Therefore teachers qualifications played no part in the factors rating Kinloch "A" as defendants would have one believe. It was common knowledge that Kinloch was an impoverished school district, and could not provide the quality and quantity of educational programs. This fact had no bearing on the relative skill and responsibility of the two positions."

(Appellees' Brief pages 16 and 17)

"The evidence clearly showed that the Ferguson-Florissant School District has a significantly greater number of teachers, students, courses offered, schools and library

books than the old Kinloch School District, making those responsibilities exercised by the Plaintiffs considerably more complex. Specifically, while Jason was principal at Kinloch High School, he supervised 22 teachers plus a pupil enrollment of 262. As assistant principal of McCluer North Senior High School, Jason had supervisory responsibility for approximately 600 students and 30 teachers. At Kennedy Junior High School in Kinloch, MacDonald supervised 170 pupils and 10 teachers while at the Berkeley Junior High School she had supervisory responsibilitiy for approximately 500 students and 35 teachers. In addition, the physical plant at both of the Kinloch Schools was considerably smaller, there being no cafeteria, gymnasium or library at Kennedy Junior High School. Therefore, even if the Plaintiffs subjectively thought that they had fewer responsibilities and exercised fewer skills after the assignment, they actually were confronting substantially more

complex situations, e.g. desegregation problems. While not a determinative factor in any case, the number of students in the schools in which the Plaintiffs were previously and are presently employed is a significant factor in determining how much responsibility one has. **Hereford, supra**, at 274, **Lee v. Walker County School System**, 594 F.2d 156, 158 (5th Cir. 1979)."

(Appellants' Reply Brief pages 2 and 3)

"In place of a head to head comparison of the responsibilities and skills of each position, the School District places undue reliance on the deficiencies of the Kinloch Schools. They point also to the "significantly greater number of teachers, students, courses offered, schools (sic) and library books" of the Ferguson-Florissant School District. (Appellees' Brief, p. 16) Again, Appellees seem to have missed the point. At issue here is not which school was "better" or "worse" than the other; this question is en-

tirely irrelevant unless it leads to the next step of asking how the quality of the schools affects the amount of responsibility bourne by its administrators.

Appellants dealt with this further question, and discussed at length the affect of school quality. (Appellants' Brief, pp. 10-14). Logically, unless the quality of the school is in some way caused by poor administration, it is difficult to conclude that principals of poorer quality schools bear less responsibility or use less skill. No evidence was presented that would suggest that Kennedy Junior High or Kinloch High School were not "AAA" schools because of poor administration by Carl Jason or Ann MacDonald.

Rather, the School District contends that, as assistant principals in the newly reorganized school district, Jason and MacDonald were "confronting more complex situations, e.g. desegregation problems" than in their previous positions. Upon what premise

is this conclusion based? Are we to believe desegregation problems are inherently "more complex" than segregation problems? Even if we were to accept this premise as tenable, it lacks the support of evidence on the record."

The district court in findings of fact numbered 4 and 5 concentrate on size and sophistication. When the case was argued before the court en banc, the question was asked whether it was appropriate to consider the fact that petitioners came from an impoverished school district. The issue of size and sophistication as permissible tactics were pleaded, argued, and briefed.

Question No. II presented to this Court was directly addressed to the Court of Appeals in the Petition for Rehearing and Suggestion That Rehearing Be En Banc. Point I was "THE COURT HAS OVERLOOKED OR MISAPPREHENDED THE BURDEN OF PROOF IN A DESEGREGATION CASE WHERE THERE HAS BEEN A LONG HISTORY OF DISCRIMINATION." This is indistinguishable from Ques-

tion II. As a result of the granting of the Petition for Rehearing, the issue was pleaded, argued, and briefed.

ARGUMENT

The Singleton Guidelines Are Applicable

Respondents argue that the guidelines articulated in **Singleton v. Jackson Municipal Separate School District**, 419 F.2d 1211 (5 Cir. 1970) are inapplicable. Their reasoning is that the application of **Singleton's** dismissal and demotion standards is limited to the particular problem of a smaller faculty caused by school desegregation, and **Singleton** requires an overall reduction in force as a result of desegregation. Respondent's principal reliance is on **Fort Bend Independent School District v. City of Stafford**, 651 F.2d 1133 (5 Cir. 1981).

Respondent's argument ignores several essential facts. Respondents were ordered (emphasis supplied) to apply the guidelines

established in **Singleton** in the conversion of school districts from a dual system to a unitary system. The district court so determined in finding of fact number 8. Respondents never argued in its brief filed before the Eighth Circuit that **Singleton** did not apply. Respondent's only argument was that if **Singleton** was applied, the result would be a finding that petitioners were not demoted. The argument was raised for the first time on appeal in Appellees Supplemental Brief filed pursuant to the granting of the Petition for Rehearing. When the court ordered the application of **Singleton**, there was no restriction on its order. The court did not condition the use of **Singleton** on whether the Fifth Circuit would have so chosen in accordance with Fifth Circuit case law. The court simply ordered their use.

Another essential is the district court below found the **Singleton** Guidelines applicable. The court reduced respondent's argument

to the proposition that **Singleton** did not apply because the demotions did not take place until after the Ferguson District became unitary. The court found that petitioner's alleged demotion occurred before the Ferguson School District became unitary and the **Singleton** guidelines applied. As appellant states in his brief, citing **Inwood Laboratories, Inc. v. Ives Laboratories, Inc.**, 456 U.S. 844 (1982), and **Pullman-Standard, a Division of Pullman, Incorporated v. Swint**, 456 U.S. 273 (1982), this finding of fact should not be set aside unless clearly erroneous.

Assuming arguendo, that **Fort Bend Independent School District, supra**, is applicable, there are still serious flaws in respondent's argument. In that case the parties stipulated that Fort Bend had been a unitary school system in all respects except in the area of employment of minority and staff members. All evidence was confined to that single question. In the instant case, the district court did

not base its finding that the school district had not become unitary as a result of its treatment with respect to employment of faculty. The court determined that desegregation was not complete, and the school district had not achieved unitary status. The sole issue before the court in **Fort Bend** was the effect of racial composition of faculty disproportionate to that of student body on the achievement of unitary status. The court in **Fort Bend** held that it was not necessary as long as the district had made sustained good faith effort to recruit faculty members so as to remedy the effects of any past discriminatory practices. **Fort Bend, supra**, at 1137, 1140.

Respondent's argument that there was no overall reduction is also without merit. The schools wherein petitioners were formerly principals were closed. There was no contemporaneous opening of two similar schools. Instead, there were two fewer principals sub-

sequent to the closing. Pursuant to the reduction in the number of principals, petitioners were given jobs as assistant principals. This was exactly the set of facts **Singleton** was designed to address.

CONCLUSION

It is clear from the foregoing that the issues raised before this Court were pleaded, argued, and briefed. Respondents were a part of such arguments throughout, and participated vigorously.

It is equally clear the **Singleton** Guidelines are applicable. Respondents appeal to Fifth Circuit case law is inapplicable as the District Court ordered application of the guidelines without reference to whether or not the Fifth Circuit would have so ordered. In addition, it was determined by the District Court that the Guidelines applied, and their application was not seriously challenged until argument before the court en banc.

WHEREFORE, Petitioners pray the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Terry, one of the attorneys for Ann MacDonald and Carl Jason, petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ of November, 1983, I served three true and correct copies of the foregoing Reply to Brief in Opposition To Petition for Writ of Certiorari upon attorney for respondent by placing same in the United States mail, with first class postage prepaid, to Norman C. Parker, Esq., Susman, Schermer, Rimmel & Parker, Tenth Floor, Aragon Place, 7711 Carondelet Avenue, St. Louis, MO 63105.

JAMES E. TERRY